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January 2, 2009

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Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, S.W  
Washington, D. C. 20423

224285

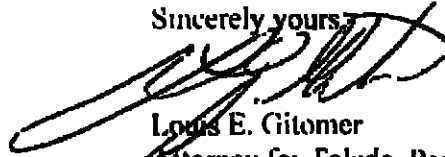
RE: Finance Docket No. 35208, *Winamac Southern Railway  
Company-Trackage Rights Exemption-A & R Line, Inc*

Dear Acting Secretary Quinlan.

Enclosed for e-filing is a Petition for Stay of the Notice of Exemption filed in the above-entitled proceeding by the Winamac Southern Railway Company. Thank you for your assistance.

If you have any questions please call or email me

Sincerely yours,



Louis E. Gitomer  
Attorney for Toledo, Peoria & Western Railway  
Corporation

Enclosure

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35208

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WINAMAC SOUTHERN RAILWAY COMPANY  
-TRACKAGE RIGHTS EXEMPTION-  
A & R LINE, INC.

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PETITION FOR STAY

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Attorneys for: TOLEDO, PEORIA AND  
WESTERN RAILWAY CORPORATION

Dated: January 2, 2009

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35208

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WINAMAC SOUTHERN RAILWAY COMPANY  
-TRACKAGE RIGHTS EXEMPTION-  
A & R LINE, INC

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PETITION FOR STAY

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The Toledo, Peoria and Western Railway Corporation ("TP&W") respectfully petitions the Surface Transportation Board (the "Board") to stay the effectiveness of the Verified Notice of Exemption (the "Notice") filed in this proceeding on December 11, 2008 by the Winamac Southern Railway Company ("WSRY") under 49 C.F.R. §1180.2(d)(7) until the Board acts on TP&W's Petition to Reject or Revoke Verified Notice of Exemption, which will be filed before the effective date of the Notice.

TP&W will demonstrate that there is a strong likelihood that it will prevail on the merits of the Petition, will suffer irreparable harm in the absence of a stay, that other interested parties will not be substantially harmed, and that the public interest supports the granting of the stay.

**STAY CRITERIA**

The Board has recently said that:

In deciding petitions for stay, the Board follows the traditional stay criteria by requiring a party seeking a stay to establish that: (1) there is a strong likelihood that it will prevail on the merits of any challenge to the action sought to be stayed, (2) it will suffer irreparable harm in the absence of a stay, (3) other interested parties will not be substantially harmed; and (4) the public interest supports the granting of the stay. *Hilton*

*v Braunkill*, 481 U.S. 770, 776 (1987); *Washington Metro Area Transit Comm'n v Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v Fed Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. *Canal Auth. of Fla v Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

*Grand Elk Railroad, L.L.C. – Lease and Operation Exemption–Norfolk Southern Railway Company*, STB Finance Docket No. 35187 (STB served December 22, 2008). TP&W will demonstrate that the stay criteria have been met in this situation.

### **BACKGROUND**

WSRY filed the Notice on December 11, 2008. The notice is scheduled to become effective on January 10, 2009. See the Notice at 1 and 49 C.F.R. §1180.4(g). In the Notice, WSRY seeks an exemption for trackage rights that it claims to have obtained through a Trackage Rights Agreement dated July 17, 1995 between WSRY and the A. & R. Line, Inc. ("A&R") (the "TRA") (See Appendix 1 of the Notice) between Van, IN, milepost 71.5, and the Eighteenth Street Yard in Logansport, IN, milepost 74.5, a three-mile line of railroad.<sup>1</sup> The Board served a notice of the filing on December 24, 2008. *Winamac Southern Railway Company – Trackage Rights Exemption– A & R. Line, Inc.*, STB Finance Docket No. 35208 (STB served December 24, 2008).

On December 8, 2008, TP&W notified WSRY that WSRY was in default under the TRA and on January 2, 2009, TP&W terminated the TRA effective January 5, 2009. Therefore, there is no trackage rights agreement for the Board to exempt or for WSRY to operate under.

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<sup>1</sup> A&R was merged into TP&W. See *RailAmerica, Inc., Et Al –Control and Merger Exemption A&R Line, Inc., and J K Line, Inc.*, STB Finance Docket No. 34269 (STB served December 12, 2002).

WSRY admits that it has not previously sought authority from the Interstate Commerce Commission (the "ICC") or the Board to operate under the TRA Notice at 3 and 4 WSR Y claims that it or its agent has operated pursuant to the TRA for more than 13 years Notice at 4 WSR Y also claims that its failure to obtain authority was an "oversight " Notice at 3.

It is apparent that WSR Y is only now seeking authority to operate under the TRA because it intends to assign the TRA to a third party Notice at 3.

TP&W will now demonstrate that the Board should stay the effectiveness of the Notice.

### **A STAY OF THE NOTICE IS JUSTIFIED**

1. There is a strong likelihood that TP&W will prevail on the merits.

WSRY's Notice is totally flawed. Either WSR Y has been operating the Line unlawfully for more than 13 years or WSR Y has provided false and misleading information to the Board in the Notice In addition, contrary to WSR Y's representation, there is no trackage rights agreement between WSR Y and TP&W.

A railroad may not operate pursuant to trackage rights without the advance authorization of the Board See 49 U.S.C. §11323. WSR Y has not been authorized to operate over the Line under the TRA since 1995. WSR Y did not even file a notice of exemption for over 13 years. If, since 1995, WSR Y has operated over the Line, which it has not, or had an agent operate for it over the Line, which has not occurred, then WSR Y has been operating in clear violation of the law. Indeed, in order to have an agent operate lawfully under the TRA, WSR Y would have needed advance approval or exemption from the ICC or Board. WSR Y did not seek such authority

WSRY's failure to obtain ICC and Board authorization for more than 13 years should not be accepted as a mere "oversight" by the Board.<sup>2</sup> WSRY is clearly in violation of 49 U.S.C. §11323. The Board "has been given wide administrative discretion to tailor remedies and sanctions for violation of the statute and its own orders. *Kraus v. Santa Fe S. Pac. Corp.*, 878 F.2d 1193, 1198 (9<sup>th</sup> Cir. 1989). TP&W urges the Board to stay the effectiveness of the Notice so that it can act on TP&W's petition to revoke or reject the Notice and to determine the appropriate remedy for WSRY's admitted violations of the law.

WSRY claims that the Line has been operated pursuant to the TRA for more than 13 years by third parties. Notice at 3. The attached verified statement of Ms. Sandy Franger disputes this unsubstantiated claim. Ms. Franger is extremely familiar with the operations based on her longevity with the holding companies controlling CFRA and TP&W, and the responsibilities of her position. Based on Ms. Franger's verified statement, WSRY statements in the Notice that third parties have been operating the Line as agents of WSRY are false and misleading. Moreover, WSRY would have been required to obtain approval or exemption for the trackage rights in order for third parties to lawfully operate. Even if third parties had operated the Line under the TRA for WSRY, which they did not, WSRY would have violated the law since it did not have authority to operate under the TRA.

Finally, WSRY will prevail on the merits because there is no longer a trackage rights agreement between WSRY and TP&W, as successor by merger to A&R, over the Line. By letter dated January 2, 2009, TP&W terminated the TRA. See Exhibit A.

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<sup>2</sup> WSRY provides no justification for its failure to seek authority or exemption from the ICC. WSRY's "oversight" should be considered even more egregious because there were two notices filed with the ICC implementing other portions of the transaction.

Even before TP&W terminated the TRA, the TRA ceased to be a binding agreement because WSRV had abandoned the agreement<sup>3</sup> under Indiana law. The delay of 13 years between the execution of the TRA and any performance by WSRV indicates an abandonment of the trackage rights agreement. This is particularly true in light of the fact that the TRA itself calls for a revision of the trackage rights charge on "July 1 of each year" (Section 8.03(b)), and provides for a renegotiation of the compensation under the contract "every (5) years from the Effective Date" (Section 8.03(e)). In short, the TRA's terms show that the parties expected that the TRA would be in effect in July of 1997 and subject to renegotiation every five years. Instead, nothing has happened and neither party has raised an objection, supports an argument that the TRA has been abandoned.

Even if the agreement had not previously been abandoned by WSRV, the contemplated assignment is not valid under Indiana law absent the consent of the TP&W. *Navin v. New Colonial Hotel*, 90 N.E.2d 128, 133-34 (Ind. 1950) (wherein the Indiana Supreme Court held that "[w]ithout the consent of the adverse party, rights which are coupled with liabilities under a contract cannot be assigned in such a way that the assignor no longer remains liable").

Finally, since the TRA has been terminated, the Board "has no general power to require a carrier to grant trackage rights over its lines." *Chesapeake & Ohio Railway Co. - Abandonment*, 366 I.C.C. 53, 54 (1981) (internal citations omitted).

As demonstrated above, there is a strong likelihood that TP&W will prevail on the merits. Therefore, a stay is warranted.

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<sup>3</sup> Abandonment of an agreement under Indiana law is not the same as an abandonment under 49 U.S.C. §10903

2. TP&W will suffer irreparable harm in the absence of a stay.

TP&W could be placed in a position of expending scarce man power and resources in litigating the rights of WSRV to operate over the Line pursuant to the TRA in the absence of a stay. TP&W is a short line railroad with limited resources. Once the Notice takes effect, WSRV can, and TP&W believes that WSRV will, claim that there is no regulatory barrier to its operation over the Line, and will seek to assign its "right" to operate under the TRA to US Rail Corporation ("US Rail") causing confusion among TP&W's customers and railroad connections.

Although TP&W will suffer financial harm from the ensuing litigation and the potential diversion of traffic, TP&W will suffer more than financial harm. There will be uncertainty and confusion that will be caused by the Notice. Moreover, TP&W is concerned that WSRV or US Rail will attempt to operate over the Line without an agreement. The safety and operational problems arising from that operation also warrant a stay of the effective date of the Notice.

Finally, TP&W will be irreparably harmed because its ability to terminate contracts pursuant to the terms of those contracts under applicable state law will be brought into question, resulting in uncertainty and even more litigation.

3. A stay will not substantially harm other interested parties.

A stay will not harm WSRV. WSRV has not used the Line during the term of the TRA. Since there was no competitive service on the Line, there will be no reduction in competition. US Rail will not be harmed because it can consummate its transaction, except for the assignment of the TRA, and make appropriate arrangements with TP&W for access over the Line.

4. The public interest supports the granting of the stay.

*The status quo in this instance is in the public interest. Rail service will continue.* Confusion will be avoided. There is no need to create confusion by providing WSRV a



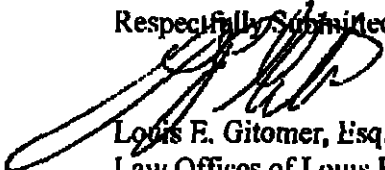
colorable, but nonetheless invalid argument concerning its right to operate over the Line under the terminated TRA and then assign those non-existent rights to US Rail

### **CONCLUSION**

TP&W has demonstrated that a stay of the Notice would be consistent with STB precedent. Therefore, TP&W respectfully requests that the STB stay the Notice until it rules on the Petition.

Respectfully Submitted,

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Senior Vice President & General Counsel  
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Attorneys for: TOLEDO, PEORIA AND  
WESTERN RAILWAY CORPORATION

Dated: January 2, 2009

### **CERTIFICATE OF SERVICE**

I certify that I have this day served copies of this Petition for Stay upon all parties of record in this proceeding, by electronic delivery.

A handwritten signature in black ink, appearing to read "Louis E. Gittomer", is written over a horizontal line.

Louis E Gittomer  
January 2, 2009

**EXHIBIT A-TERMINATION LETTER**



## CENTRAL RAILROAD OF INDIANAPOLIS

1001 East Washington Street • East Chicago, IN 46611 • Phone: 407 698 7600 • Fax: 407 698 7679

January 2, 2009

Mr. Raymond L. Orman  
President  
Winamac Southern Railway Company  
P.O. 55  
Kokomo, IN 46903

Re: July 17, 1995 Trackage Rights

Dear Mr. Orman:

We have received your letter of December 12, 2008. The analysis in your letter concerning the assignment issue has been reviewed by our counsel and they have come to a different conclusion. Therefore, the Toledo, Peoria & Western Railway Corporation ("TP&W") terminates the July 17, 1995 Trackage Rights Agreement pursuant to Article Seven as of January 5, 2009.

TP&W is willing to negotiate a new arrangement for the access sought by the Winamac Southern Railway Company.

Sincerely yours,

J. B. Ovitt  
Regional Vice President - Midwest

Copy to: S. Franger, P. Crawford - RailAmerica via email  
G. Hall, B. Orman, S. Orman - WSKY/Kokomo Grain via email



A RailAmerica Company

**EXHIBIT B-FRANGER VERIFIED STATEMENT**

WINAMAC SOUTHERN RAILWAY COMPANY  
-TRACKAGE RIGHTS EXEMPTION-  
A & R LINE, INC.

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VERIFIED STATEMENT OF SANDY FRANGER

I am Sandy Franger, Vice-President Contracts of RailAmerica, Inc. I have been with RailAmerica and RailTex, Inc since 1988. In my position, I am responsible for the implementation of all of the contracts between RailAmerica's subsidiary railroads and other railroads. I am familiar with the agreements between the Winamac Southern Railway Company ("WSRY") and the successors to the Toledo, Peoria and Western Railway Corporation ("TP&W"), including the Trackage Rights Agreement dated July 17, 1995 (the "TRA") between WSRY and A. & R. Line, Inc. ("A&R"). I am also familiar with the operations that occur under the contracts, including the TRA.

The TRA granted WSRY overhead trackage rights over A&R's rail line for the purpose of handling WSRY trains only between Van, IN, milepost 71.5, and the Eighteenth Street Yard in Logansport, IN, milepost 74.5, a total distance of three miles (the "Line").

From July 17, 1995 until December 11, 2008, WSRY did not seek authority from either the Interstate Commerce Commission or the Surface Transportation Board to operate over the Line pursuant to the TRA.

WSRY claims that the Central Railroad Company of Indianapolis ("CERA"), another railroad subsidiary of RailAmerica, took over the operations of the Line for

WSRY under the TRA, as WSRV's agent. WSRV also claims that operations under the TRA have been conducted for more than 13 years.

*WSRV has never operated over the Line under the TRA. In addition, there are no records in the possession of TP&W or CERA that indicate that TP&W or its predecessors or CERA ever operated over the Line as agents for WSRV under the TRA. Indeed, RailAmerica would not have permitted its subsidiary railroads to operate without appropriate authority. WSRV's statement that the Line has been operated under the TRA for 13 years is wrong. WSRV's claim that CERA has operated under the TRA as the agent for WSRV is also wrong. WSRV has provided the Board with false and misleading information.*

*In addition, TP&W is not willing to voluntarily accept the labor protective conditions proposed by WSRV. The labor protection proffered by WSRV is also another false and misleading statement.*

### **VERIFICATION**

I, Sandy Franger, declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed this 2<sup>nd</sup> day of January 2009.

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Sandy Franger